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IN THE COURT OF APPEALS OF INDIANA

INDIANA DEPARTMENT OF TRANSPORTATION,	)	
Appellant-Repsondent,	)	
vs.	)	No. 49A02-0702-CV-167
U.S. OUTDOOR ADVERTISING COMPANY, INC.,	)	
Appellee-Petitioner.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Patrick McCarty, Judge
Cause No. 49D03-0408-MI-1476

March 11, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Indiana Department of Transportation (INDOT) appeals the trial court's order on judicial review reversing INDOT's decision to deny two of U.S. Outdoor Advertising Company, Inc.'s (U.S. Outdoor) applications for outdoor advertising sign permits. This case involves the continuing saga of two billboards that have remained standing along Interstate 70 for fourteen years after they were first determined by INDOT to be ineligible for outdoor advertising permits. This case returns to our Court approximately nine years after we remanded the case to INDOT for a definitive determination of the zoning for the properties on which the two billboards at issue are located. On remand, INDOT determined that the properties were zoned residential, and not commercial or industrial, thereby making the two billboards ineligible for outdoor advertising permits and requiring their removal. On judicial review, the trial court determined that although the properties were zoned residential under a zoning ordinance, the permitted uses in this residential zoning category allowed for commercial uses, such as agricultural activity, and reversed INDOT's decision. INDOT presents the following restated issue for review: Did the trial court err by reversing INDOT's denial of U.S. Outdoor's sign permits?

We reverse.

U.S. Outdoor owns two billboards—the Bodkin sign and the Shelby sign—located on property along Interstate 70 in Hancock County. Both billboards were originally erected prior to 1968 and are within 660 feet of the right-of-way of Interstate 70. In 1993, U.S. Outdoor applied to INDOT for outdoor advertising permits for the two billboards. At that time, the properties on which the two billboards were located were

zoned residential or R-1 under the Hancock County Zoning Ordinance. Sometime during 1994, U.S. Outdoor reconstructed both the Bodkin sign and the Shelby sign and installed new faces on the supporting structures.[1] In August 1994, INDOT denied U.S. Outdoor's applications for permits.

U.S. Outdoor appealed the denial and, after an administrative hearing, the administrative law judge (ALJ) issued a recommended order for INDOT to affirm the denial of U.S. Outdoor's permit applications. Thereafter, in 1996, the INDOT Commissioner accepted the ALJ's recommended order, affirmed the denial of the permits, and directed the two billboards to be removed.

U.S. Outdoor then filed a petition for judicial review. U.S. Outdoor also filed a petition requesting a stay of enforcement of INDOT's order to remove the signs, which the trial court granted. After a hearing on judicial review, the trial court, in February 1998, affirmed INDOT's denial of permits.

U.S. Outdoor then appealed to this Court and challenged the denial of the permits on statutory, constitutional, and equity grounds. We discussed the contents and purpose of the Billboard Act (Ind. Code §§ 8-23-20-1 to –26 (West, PREMISE through 2007 1st Regular Sess.)), as well as the administrative rules relating to the same, and held, among other things, that: (1) U.S. Outdoor had substantially altered the Bodkin sign and the Shelby sign in violation of the Billboard Act, thereby rendering them ineligible for a conditional permit under 105 Ind. Admin Code 7-3-7; and (2) a remand was necessary to

[1] For specific details of how the signs were altered, see generally *U.S. Outdoor Advertising Co., Inc. v. Ind. Dep't of Transp.*, 714 N.E.2d 1244 (Ind. Ct. App. 1999), *trans. denied*.

conclusively determine the zoning for the properties on which the two billboards are located in order to determine if they would be eligible for a permit under 105 I.A.C. 7-3-6(1). *U.S. Outdoor Adver. Co., Inc. v. Ind. Dep't of Transp.*, 714 N.E.2d 1244 (Ind. Ct. App. 1999), *trans. denied*. Specifically, in regard to the zoning issue, we explained:

> What remains to be determined, however, is whether the reconstructed Bodkin and Shelby signs are currently ineligible for permits under Ind. Admin. Code 105, 7-3-6(1). The ALJ found that both signs were located on property that was zoned residential, but the relevant evidence adduced at the administrative hearing was properly objected to on hearsay grounds. As noted above, "an administrative decision may not be based solely upon hearsay evidence." *Ram Broadcasting*, 484 N.E.2d at 34. The ALJ's implicit determination that both signs are within 660 feet of the right-of-way of Interstate 70 is supported by sufficient competent evidence; however, the critical determination of whether the signs are located in either residential or "zoned or unzoned commercial areas" is not. Although one could argue that the ALJ's decision of permit ineligibility is not based solely on hearsay evidence, we refuse to engage in semantic sophistry to resolve the question. Having found that both signs are ineligible for conditional permits under Ind. Admin. Code 105, 7-3-7(1), we remand this cause to the department for a hearing to determine the zoning of the properties on which the signs are located. *If the properties are found to be zoned residential, the signs would be ineligible to receive permits under Ind. Admin. Code 105, 7-3-6(1) and should be removed in accordance with the relevant provisions of the Billboard Act.*

Id. at 1259 (emphasis supplied and footnote omitted). We also noted that:

> . . . Ind. Admin. Code 105, 7-3-6(1) states that no permit may be issued for a sign "[w]ithin six hundred sixty (660) feet of the right-of-way of a roadway, erected after January 1, 1968, *except in zoned or unzoned commercial or industrial areas*." (Emphasis supplied.) The evidence upon which the ALJ relied to find that the Bodkin and Shelby properties are zoned residential is hearsay; because the signs *may* be eligible for permits if the properties are found to be "zoned or unzoned commercial or industrial areas," we are convinced that zoning is such an essential factor in determining permit eligibility that we must remand this case to INDOT for a hearing instead of affirming the ALJ's decision, even though it was not based solely on hearsay.

Id. at 1259 n.16. Thus, we remanded the case to INDOT for a final determination on the matter.[2] *U.S. Outdoor Adver. Co., Inc. v. Ind. Dep't of Transp.*, 714 N.E.2d 1244.

On remand, the ALJ for INDOT set an administrative hearing to determine the zoning of the property on which the billboards were located. Prior to the hearing, INDOT moved for summary judgment, arguing that the undisputed evidence showed that the properties where the Bodkin sign and the Shelby sign are located were zoned residential and, thus, ineligible for an outdoor sign permit under 105 I.A.C. 7-3-6(1). U.S. Outdoor responded to INDOT's motion and filed a cross-motion for summary judgment. U.S. Outdoor argued that the residential zoning designation under which the two properties were zoned contained a permitted use for agriculture, which involved a business purpose and would make the two signs eligible for permits.

In January 2004, the ALJ issued a proposed order on the parties' motions for summary judgment. After finding that the designated evidence submitted by both U.S. Outdoor and INDOT revealed that the properties on which the two signs stood were located in areas zoned "Residential 1" and were "not currently, nor d[id] records indicate that they ever were, in 'zoned or unzoned commercial or industrial areas[,]'" the ALJ determined that INDOT's motion for summary judgment should be granted, that

[2] In regard to U.S. Outdoor's equity and constitutional arguments, we determined that: (1) INDOT was not equitably estopped from denying the applications for permits; (2) U.S. Outdoor was not denied due process; (3) the Billboard Act, specifically I.C. § 8-23-20-25, did not violate U.S. Outdoor's right to free speech and equal protection; and (4) U.S. Outdoor's argument regarding an unconstitutional taking without just compensation was premature, and nevertheless, the State was not required to acquire and pay just compensation for them under I.C. § 8-23-20-10 because Outdoor's reconstruction of the signs changed their status to illegal signs. *See U.S. Outdoor Advertising Co., Inc. v. Ind. Dep't of Transp.*, 714 N.E.2d 1244.

INDOT's decision to deny permits for the billboards should be affirmed, and that the billboards should be removed. *Appellant's Appendix* at 25. U.S. Outdoor objected to the ALJ's proposed order. In July 2004, INDOT's Commissioner accepted the ALJ's recommended order in full, thereby affirming the denial of the permits and directing the two billboards to be removed.

In August 2004, U.S. Outdoor filed a petition for judicial review. In December 2006, the trial court held a hearing on the matter, and the parties made the same arguments regarding zoning as they had on summary judgment in front of the ALJ.[3] In January 2007, the trial court adopted U.S. Outdoor's proposed findings of fact and conclusions of law and issued an order reversing INDOT's decision to deny permits to U.S. Outdoor for the Bodkin and Shelby signs. The trial court found that the two billboards were located on property zoned "R-1" or residential under the Hancock County Zoning Ordinance but concluded that the billboards were nevertheless eligible for a permit under 105 I.A.C. 7-3-6(1), which allows a permit for signs located in zoned commercial or industrial areas. *Appellant's Appendix* at 9. The trial court reviewed the statutory definition of "zoned commercial or industrial areas", *see* Ind. Code Ann. § 8-23-1-47 (West, PREMISE through 2007 1st Regular Sess.), and noted that "[t]his statute

[3] During the judicial review hearing, U.S. Outdoor informed the trial court that it was re-raising the constitutional issues it had raised in the prior appeal as means of preserving the issues to take to the United States Supreme Court. U.S. Outdoor acknowledged that our Court had already held in the prior appeal that U.S. Outdoor was "all wet on these [constitutional] issues" but contended that our Court had erred in so holding. *Transcript* at 3. We note that U.S. Outdoor petitioned for transfer to the Indiana Supreme Court following the prior appeal and was denied transfer, but U.S. Outdoor did not file a petition for certiorari. U.S. Outdoor cannot re-litigate issues that have already been decided adversely to it in the prior appeal, and we fail to see how U.S. Outdoor would expect to petition for certiorari for the previously litigated constitutional issues.

does not indicate that the area must be zoned exclusively for business industry, commerce, or trade, but rather that the zoning must include one of these uses" and that the "statute does not prohibit billboards in areas that are also zoned for residential use." *Appellant's Appendix* at 9. The trial court, therefore, concluded that the properties on which the two billboards were located would be eligible for permits because their R-1 residential zoning designation included a permitted use for agriculture, which it concluded was a business pursuit. INDOT now appeals the trial court's order on judicial review.

INDOT argues that the trial court's order on judicial review was erroneous because the trial court failed to apply the plain language of 105 IAC 7-3-6(1) and I.C. § 8-23-1-47. Judicial review, by both the trial court and this Court, of an administrative decision is limited. *Bucko Const. Co., Inc. v. Indiana Dep't of Transp.*, 850 N.E.2d 1008 (Ind. Ct. App. 2006). We may not try the case de novo, reweigh evidence, or substitute our judgment for that of the agency. *Andrianova v. Indiana Family & Soc. Servs. Admin.*, 799 N.E.2d 5 (Ind. Ct. App. 2003). We must defer to the administrative body's expertise, and we will reverse an agency's decision only if it is: (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to a constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence. *Ind. Dep't of Envtl. Mgmt. v. Lake County Solid Waste Mgmt. Dist.*, 847 N.E.2d 974 (Ind. Ct. App. 2006), *trans denied*.

This case involves a question of law, *i.e.*, the interpretation of 105 IAC 7-3-6(1) and I.C. § 8-23-1-47. We apply a *de novo* review to questions of law, and we owe no deference to the trial court on such inquiries. *Id.* "An interpretation of statutes and regulations by an administrative agency charged with the duty of enforcing those regulations and statutes is entitled to great weight unless this interpretation would be inconsistent with the law itself." *Ind. State Bd. of Educ. v. Brownsburg Cmty. Sch. Corp.*, 865 N.E.2d 660, 665 (Ind. Ct. App. 2007) (citing *LTV Steel Co. v. Griffin*, 730 N.E.2d 1251 (Ind. 2000)). Rules of statutory construction also apply to administrative regulations. *U.S. Outdoor Adver. Co., Inc. v. Ind. Dep't of Transp.*, 714 N.E.2d 1244. "When a statute is clear and unambiguous, we need not apply any rules of construction other than to require that words and phrases be taken in their plain, ordinary, and usual sense." *City of Carmel v. Steele*, 865 N.E.2d 612, 618 (Ind. 2007). "Clear and unambiguous statutes leave no room for judicial construction." *Id.*

We note that the trial court adopted verbatim U.S. Outdoor's proposed findings of fact and conclusions of law. "Although it is not prohibited to adopt a party's proposed order verbatim, this practice weakens our confidence as an appellate court that the findings are the result of considered judgment by the trial court." *Ind. Dep't of Envtl. Mgmt. v. Lake County Solid Waste Mgmt. Dist.*, 847 N.E.2d at 983 (citations omitted).

Here, the trial court reversed INDOT's determination that U.S. Outdoor's two signs were ineligible for permits under 105 IAC 7-3-6(1). This administrative rule provides that "[n]o permit, except as provided in section 7 of this rule, may be issued for any sign structure . . . [w]ithin six hundred sixty (660) feet of the right-of-way of a

roadway, erected after January 1, 1968, *except in zoned* or unzoned *commercial or industrial areas*." 105 IAC 7-3-6(1) (emphasis added). As part of the Billboard Act, the legislature has defined "[z]oned commercial or industrial areas" as "those areas that are zoned for business, industry, commerce, or trade under a zoning ordinance." I.C. § 8-23-1-47.

INDOT contends that the trial court erred by reversing INDOT's denial of permits because "[t]he rule and statute clearly speak to the overall zoning designation of a zoned area, not to possible uses within a particular zoned area that may or may not occur." *Appellant's Brief* at 15. U.S. Outdoor contends that the trial court's reversal was proper because the statute "unambiguously provides that if zoning allows use for business, industry, trade or commerce, a permit may be issued for a billboard." *Appellee's Brief* at 8. We agree with INDOT.

The legislature's definition of zoned commercial areas unambiguously provides that it includes areas that *are zoned* for business or commerce under a zoning ordinance, not areas that have a permitted use for business or commerce under the zoning ordinance. To interpret the provisions at issue to allow a billboard to be placed in a residential-zoned area just because the residential zoning designation contained a commercial permitted use is contrary to the plain language of the statute. Furthermore, such an interpretation would be contrary to the purpose of the Billboard Act. As we noted in this case in the prior appeal:

> The purpose of the state and federal Billboard Acts . . . is obviously to promote the safety and recreational value of public travel, and to preserve natural beauty[, which] is to be accomplished by regulating the placement

> and content of new outdoor advertising signs and allowing state governments (with federal assistance) to pay just compensation for the removal of existing signs that do not conform to the dictates of the federal Billboard Act.

U.S. Outdoor Adver. Co., Inc. v. Ind. Dep't of Transp., 714 N.E.2d at 1257 (citations and internal quotations omitted).

The undisputed evidence reveals that the Bodkin sign and Shelby sign are located on properties that are zoned residential or R-1 under the Hancock County Zoning Ordinance. Under the plain language of 105 IAC 7-3-6(1) and the applicable definition in I.C. § 8-23-1-47, the signs are ineligible for permits. *See id.* (explaining that if the properties are zoned residential, the signs are ineligible to receive permits). Accordingly, we reverse the trial court's order on judicial review.

Judgment reversed.

MATHIAS, J., and ROBB, J., concur.